IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Civil Application (St.) No.20430 of 2007
IN
First Appeal No.225 of 1990

1. Rajeshkumar Champaklal Shah & ors. ... Applicants (Res.Nos.8 to 11)

v/s.

Dr.Jitendrasinh Mohansinh Parmar. ... Respondent (Appellant) (Orig. Plaintiff)

A n d

Ambarben Ramabhai Patel (widow) & ors. ... Respondents (Res.Nos.1 to 7 in Appeal) (Orig. Defendants)

Miss Bhavana Shah for Applicants.

Mr.Ajay Varma, representative of Mr.H.E. Palwe for Respondent No.1, present.

CORAM : SMT.ROSHAN DALVI, J
Dated : 28th November 2007

P.C. :

1. The Applicants are Respondent Nos.8 to 11 in the above First Appeal. They have been brought on record in the Appeal itself. They were not parties to the original Suit. They are the purchasers and developers of the suit property.

2. The original Suit was filed by the Appellant for specific

performance of an Agreement dated 22nd February 1983, Exhibit 77 in the Suit, to sell the suit land to him. The Suit came to be dismissed by the learned Civil Judge, Dadra and Nagar Haveli, Silvassa by a judgment and order dated 27.2.1990. The Appellant preferred the above Appeal. Initially, Respondent Nos.1 to 7 were the only Respondents in the Appeal. They were the vendors of the suit property. The Appellant was the purchaser. Pending the Appeal, Respondent Nos.8 to 11 (the Applicants herein) were brought on record.

3. They were represented by the Advocates M/s.Mahimkar & Company. They were heard at the time of the initial Interim Application in this appeal. They had opposed the grant of interim reliefs. After hearing them, the interim reliefs were not granted to the Appellant. They were allowed to carry out construction on the suit property purchased by them from Respondent Nos.1 to 7 after the Appellant's Suit came to be dismissed in the trial Court. They have since constructed two buildings upon the suit property.

4. When the Appeal reached hearing, one Advocate appeared for all the Respondents.

5. The Appeal was considered on merits. The Advocate for the

Appellant and the Respondents were heard. The judgment and order of the learned trial Judge came to be set aside. Specific performance claimed by the Appellant was granted.

6. The Applicants (who are Respondent Nos.8 to 11 in the Appeal) claim that they have not been heard and that no notice of hearing of the Appeal was served upon them. There is no provision in law requiring the court to issue notice of hearing of the Appeal. They were represented in the Appeal by their Advocates. They had opposed the grant of interim reliefs in the Appeal. It is for them to pursue and defend the Appeal in which they were made parties and initially heard.

7. Nevertheless, they claim that the Firm of Advocates representing them had changed its address, which was not informed to them. It is contended that they even made inquiries with the Bar Council of Maharashtra and Goa. They were supplied a new address of the Advocates' Firm. The Advocates' Firm was not contactable even on that address. They also claim that they were not served the paper-book and the amendments. The record and proceedings are shown. It appears that they have got sufficient service. However, the records also show the names of their Advocates who are seen to have changed their address. Their contention that they were not notified of the

changed address cannot be challenged. They deserve to be heard on merits.

8. They further claim that initially the Appeal was placed before a Division Bench of this court. The order on the Interim Application was also granted by the Division Bench. The Appeal came to be admitted by the Division Bench. Thereafter it was on board of the Single Judge. They have challenged the jurisdiction of the Single Judge to hear and dispose of the Appeal. It would be for the office to consider the relevant provisions of the Appellate Side Rules to place the matter on board of the correct Bench.

9. On merits, they contend that the property has been fully developed and constructed upon. The Suit is in respect of 4 Ares of land out of 60 Ares. Pending the Suit, under another compromise decree, 45 Ares out of 60 Ares came to be acquired by Indian Red Cross Society. Out of 15 Ares, the Appellant (original Plaintiff) claimed 4 Ares. In the Appeal, those 4 Ares came to be identified and hence, specific performance was granted. It is now contended that the 15 Ares, that remained with Respondent Nos.1 to 7, came to be sold to the Applicants (Respondent Nos.8 to 11 in Appeal) for a consideration of Rs.7 Lacs under an Agreement of sale dated 18th July 1994. The Applicants have since fully

constructed the said land which includes the land claimed by the Appellant (original Plaintiff). They claim that this land is not identifiable as to which 4 Ares out of remaining 15 Ares of land in possession of Respondent Nos.1 to 7 came to be agreed to be sold to the Appellant so as to grant him specific performance of that Agreement. That aspect would have to be decided in the Appeal. Since it is contended by the Respondents that the entire land of 15 Ares has been fully constructed upon, that aspect would have a material bearing upon the ultimate result of the Appeal on merits.

10. The Applicants have produced photographs, showing the property of the Red Cross alongside and adjacent to their property, upon which two buildings have been constructed. It is divided by a fence and compound wall with trees. It is the contention of the Applicants that no part of the land is now vacant.

11. If this is the true position, it was to the knowledge of the Appellant at the time of hearing of the Appeal. That aspect was not brought to the notice of the court. That aspect would require to be reconsidered for the ultimate justice to be done to both the parties claiming the suit land.

12. After this Application came to be made and served upon the

Appellant, negotiations between the parties and settlement of their claim came to be considered as the best possible solution. Hence, the hearing of the this Application came to be adjourned twice to enable the parties to negotiate a settlement.

13. Pending this Application, the Applicants have moved a Special Leave Petition (SLP) in the Supreme Court. The SLP is posted for hearing on 30th November 2007. The Applicants, therefore, press for an order on this Application.

14. This Civil Application was served upon the Advocate for the Appellant, initially on 13th September 2007 by registered Post, informing him that it would come up for hearing before a Division Bench of this Court. After the matter was assigned to the Single Judge, a further notice was given on 29th October 2007 to the Appellant's Advocate by registered Post, informing him of the date and time on which the Application would be moved before this Court. The Appellant's Advocate replied to the notices by letter without date. The contents of letter shows that it was received prior to 19th November 2007. Since the Advocate for the Appellant mentioned in his letter that the Appellant was not available for giving instructions to him, the Appellant himself was served another notice on 7th November 2007, also by

registered Post. The Appellant as well as his Advocate appeared before the Court. As aforesaid, the matter was adjourned for settlement. Negotiations commenced, but were not complete.

15. On the last occasion, the Appellant as well as Advocate failed to appear or filed any affidavit-in-reply. One Mr.Ajay Varma, representative of the Advocate of the Appellant, states that the Appellant and the Advocate are not available today. The Advocate as well as the Appellant were informed on the last occasion when they were before this Court that an order would be passed on this Civil Application before the date of hearing of the SLP. The SLP is scheduled to be heard on the board of the Apex Court on 30th November 2007. Under the circumstances, an order is required to be passed on the Civil Application. Since no affidavit-in-reply is filed, the contentions made must be taken to be admitted. Even otherwise, it is seen that the interest of justice demands that all parties are heard in the appeal. Though an Advocate appeared before the Court and was shown to be an Advocate on behalf of the Respondents, it is seen that he was instructed to appear only by Respondent Nos.1 to 7 and not by Respondent Nos.8 to 11. Respondent Nos.8 to 11 are the real contesting parties. They deserve to be heard on merits. Hence, the following order:-

O R D E R

(i) The impugned judgment and order dated 12th June 2006 passed by this Court is set aside. The Appeal is restored to file for being heard on merits. It shall appear on board of the concerned Court on 10th December 2007.

(ii) The Respondents, who failed to appear in the Appeal, would be required to pay costs for setting aside the judgment and order in their absence. Upon Respondent Nos.8 to 11 paying costs of Rs.3,000/- , the judgment and order dated 12th June 2007 passed by this Court is set aside and the Appeal shall be restored to the file and heard on merits.

(iii) The Registrar (Judicial) shall go through the papers and Appeal to determine whether this Appeal should be placed before a Single Judge or a Division Bench of this Court.

16. Parties to act on an authenticated copy of this order.

(SMT.ROSHAN DALVI, J.)